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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. JOSE ISMAEL SERRANO, Defendant.	No. CR 07-00212 WHA MOTION TO DISMISS MOTION UNDER 28 U.S.C. § 2255

The United States, through its undersigned counsel, moves to dismiss the motion under 28 U.S.C. § 2255 filed by the defendant. The motion should be dismissed because it argues that a provision of the Sentencing Guidelines is void for vagueness, and on March 6, 2017, the Supreme Court held that the advisory Sentencing Guidelines are not subject to vagueness challenges. Because the advisory Guidelines are not subject to vagueness challenges, the Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held that a portion of the Armed Career Criminal Act was void for vagueness, does not apply to the defendant's conviction and cannot be retroactive to the Guidelines.

BACKGROUND

On July 9, 2007, the defendant was convicted of possession with intent to distribute cocaine base, in violation of 21 U.S.C. § 841(a)(1). Defendant had prior convictions including a

controlled substance offense and assault with a deadly weapon, in violation of California Penal Code, Section 245(a)(1). At sentencing, this Court found that under the career offender Guideline, U.S.S.G. § 4B1.1, the defendant's prior controlled substance offense constituted a drug trafficking offense and the defendant's assault conviction constituted a crime of violence. For that reason, the Court applied the Career Offender guidelines and set defendant's offense level at 34. The Court sentenced the defendant to 204 months, a variance below the defendant's resulting Guidelines range of 262-327 months. The defendant appealed, and the Ninth Circuit affirmed.

On June 26, 2015, the Supreme Court held in *Johnson* that the residual clause of the Armed Career Criminal Act's "violent felony" definition, 18 U.S.C. § 924(e)(2)(B)(ii), is void for vagueness. On June 17, 2016, the defendant filed a petition under 28 U.S.C. § 2255 alleging that his prior conviction for assault had been found to be a "crime of violence" under the residual clause of Section 4B1.2, and the Supreme Court's decision in *Johnson* rendered that clause void for vagueness. Because this was not the defendant's first § 2255 petition, however, the defendant had to seek permission from the Ninth Circuit to file the petition. On January 25, 2017, the Ninth Circuit granted the defendant's request and authorized the District court to proceed with its consideration of the petition. The government has not yet filed a response.

ARGUMENT

On March 6, 2017, the Supreme Court held in *Beckles v. United States*, 2017 WL 855781 (Mar. 6, 2017), that the advisory Sentencing Guidelines are not subject to vagueness challenges. Because the premise of defendant's motion is that the residual clause of Section 4B1.2 is void for vagueness, *Beckles* forecloses the Court from granting the defendant relief on his Section 2255 motion. Accordingly, the defendant's Section 2255 motion should be dismissed.

Defendant may argue that the United States waived the argument that the Court accepted in *Beckles* by conceding that the residual clause of Section 4B1.2 was void for vagueness and arguing only that *Johnson* should not apply retroactively to the Guidelines on final convictions. But by holding that the Guidelines are not subject to vagueness challenges, the Court necessarily concluded that *Johnson* is not retroactive to the Guidelines. In other words, *Johnson* cannot be retroactive because its holding does not apply to the Guidelines.

Moreover, the government should not be held to a concession when intervening Supreme Court authority makes clear that the concession was in error. For example, in *United States v. Miller*, 822 F.2d 828 (9th Cir. 1987), the court of appeals held that the government was entitled to withdraw, in light of intervening Supreme Court authority, a concession that it had made about the legality of a search under the Fourth Amendment. *See id*. at 831-32. As the court explained, prior decisions addressing waiver "do not speak to a situation where this court finds that a party in making a concession has erroneously construed the law" even when the government's concession formed the basis for a prior appellate ruling in the defendant's favor. *Id*. at 832-33. An intervening Supreme Court precedent suffices to overcome the government's prior litigation decision. *See Morris v. American National Can Corp.*, 988 F.2d 50, 51-53 (9th Cir. 1993) (intervening Supreme Court decision overcomes law-of-the-case doctrine); *see also Biomedical Patent Mgmt. Corp. v. Cal. Dep't of Health Servs.*, 505 F.3d 1328, 1342 (Fed. Cir. 2007) (for purposes of judicial estoppel, even if party's "positions are inconsistent, the inconsistency is excused by an intervening change in the law"). In fact, the Ninth Circuit has considered arguments raised after a Supreme Court decision establishing new law. *See United States v. Cabrera-Gutierrez*, 756 F.3d 1125, 1127 (9th Cir. 2013); *see also United States v. Aguilera-Rios*, 769 F.3d 626, 631 (9th Cir. 2014) (choosing to reach issue not raised earlier "because of a change in the intervening law that the brought the issue into focus"); *Joseph v. United States*, 135 S. Ct. 705, 706 (2014) (statement of Kagan, J., joined by Ginsburg & Breyer, JJ., respecting the denial of certiorari) ("When a new claim is based on an intervening Supreme Court decision[,] … the failure to raise the claim in an opening brief reflects not a lack of diligence, but merely a want of clairvoyance."). In short, the government's earlier litigating position provides no reason to deviate from the general "rule that 'a court is to apply the law in effect at the time it renders a decision.'" *Landgra v. USI Film Products*, 511 U.S. 244, 264 (1994) (quoting *Bradley v. School Board of Richmond*, 416 U.S. 696, 711 (1974)).

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CONCLUSION

The defendant's motion under 28 U.S.C. § 2255 should be dismissed.

DATED: March 13, 2017

Respectfully submitted,

BRIAN J. STRETCH
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/s/
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